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10 *Attorney for Defendants*

11 *Cochise County, Cochise County Board of Supervisors & Cochise County Clerk, Arlethe Rios*

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF COCHISE**

14
15 TERRI JO NEFF, a single woman,

16 Plaintiff,

17 v.

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19 COCHISE COUNTY; COCHISE
20 COUNTY BOARD OF SUPERVISORS;
21 ARLETHE RIOS, COCHISE COUNTY
22 CLERK,

23 Defendants.

) **Case No. CV201900323**

)
) **DEFENDANTS' REPLY TO**
) **PLAINTIFF'S RESPONSE TO**
) **DEFENDANTS' MOTION TO**
) **DISMISS PLAINTIFF'S STATUTORY**
) **SPECIAL ACTION COMPLAINT**

) **Assigned to Hon. David Thorn**
) **Div. III**
)
)

24 Defendants Cochise County, Cochise County Board of Supervisors, and Arlethe
25 Rios, Cochise County Clerk (collectively, "Defendants"), through undersigned counsel,
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27 hereby replies to Plaintiff's Response to Defendants' Motion to Dismiss.
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Page 2 of 7

1 *Id.* As such, an engagement letter is a confidential communication protected by
2 attorney-client privilege. Therefore, Plaintiff's assumption that the engagement letter is
3 not a confidential attorney-client privileged document is a fallacy, as there is evidence
4 that it is privileged from our closest neighboring state.²
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7 **II. THERE ARE NO ARIZONA CASES DIRECTLY ON POINT FOR THE**
8 **ISSUE.**

9 The fact remains, and Plaintiff acknowledges (Plaintiff's Response, p.8, 8:7-8:9),
10 that there are *no* Arizona cases that directly address the applicability of attorney-client
11 privilege to engagement letters in the context of a public records request. Moreover, the
12 cases that Plaintiff offers in support of her position are inapposite and easily
13 distinguishable from the instant matter.
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15 First, in her Response Plaintiff proffers a litany of federal cases from Ninth and
16 Eighth Circuits. However, none of those cases interpret Arizona state law. The federal
17 cases involve federal questions, not diversity, and specifically interpret federal common
18 law, the Federal Rules of Evidence and federal privilege, which is much different from
19 Arizona state law. *See United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir.
20 1995)(“The district court correctly noted that ‘since the adoption of the Federal Rules of
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25 ² In Plaintiff's Response she cites cases from New York and Utah where those Courts held
26 certain aspects of retainer agreements were not subject to attorney-client privilege. However,
27 there is a conflict between these states and states like California that make engagement letters
28 confidential communications protected by attorney-client privilege. There is no evidence to
29 suggest that Arizona would not take the same position on this issue as California. In fact,
Arizona's Public Records Law was modeled after California's Public Records Law. (Plaintiff's
Response, Exhibit 1, p. 5, ¶ 1 (“Since A.R.S. § 39-121 was adopted from California, California
judicial decisions are of assistance in interpreting our statute.”). Under California Public Records
Law, an engagement letter is a protected communication subject to attorney-client privilege.

1 Evidence, courts have uniformly held that federal common law of privilege, not state
2 law applies.' See *Sepenuk*, 864 F.Supp. at 1004 n.1; *Clarke*, 974 F.2d at 129 ('Issues
3 concerning application of the attorney-client privilege in the adjudication of federal law
4 are governed by federal common law')(citing *United States v. Zolin*, 491 U.S. 554, 562,
5 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989); Fed.R.Evid. 501)."; see also *Clarke v.*
6 *American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992) ("Issues
7 concerning application of the attorney-client privilege in the adjudication of federal law
8 are governed by federal common law . . . (citations omitted)"). Because federal law is
9 not Arizona state law, the federal cases proffered by Plaintiff in support of her position
10 do not construe or interpret Arizona state law and are inapposite for the issue at hand.
11 Consequently, this Court should not consider these cases in its analysis.

16 Second, in her Response Plaintiff acknowledges that the Arizona cases that she
17 cited do not directly address the issue at hand.³ (Plaintiff's Response, p. 4, 4:7-4:10,
18 4:15-4:17.) Plaintiff then goes on to describe the unrelated matters and quotes *dicta*

21 ³ *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 64, 13 P.3d 1169 (2000) is a case
22 about waiver and implied waiver of attorney-client privilege in the context of an insurance bad-
23 faith lawsuit against an insurance company for rejection of uninsured/underinsured motorist
24 claims. *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238 (1982) is a case about whether
25 attorney-client privilege applied to a consulting expert retained by plaintiff, who was later called
26 by defendant to testify in a medical malpractice lawsuit. *Ulibarri v. Superior Court In & For*
27 *Cty. of Coconino*, 184 Ariz. 382, 909 P.2d 449 (Div. 1 1995) is a case about whether there was a
28 waiver of attorney-client privilege in a medical malpractice case. *KPNX-TV v. Superior Court In*
29 *& For Cty. of Yuma*, 183 Ariz. 589, 905 P.2d 598 (Ct. App. 1995) is a case about refusal to
disclose law enforcement investigatory records based on the "best interest of the state" exception
to disclosure of public records - not based on "records made confidential by statute" exception, as
is the case here - where the Court used a balancing test and in camera review of the materials.
No such balancing test is applied in this situation. None of Plaintiff's cited cases address the
records made confidential by statute exception to public records disclosure as it applies to an
attorney-client privileged engagement letter.

1 regarding the applicability of the attorney-client privilege. However, *dicta* is not
2 Arizona state law. None of Plaintiff's cited cases stands for the proposition that a
3 confidential attorney-client privileged engagement letter must be disclosed in response
4 to a public records request. Consequently, these cases are inapposite and
5 distinguishable, and this Court should not consider these cases in its analysis.
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8 **III. ARIZONA PUBLIC RECORDS LAW EXEMPTS THE DISCLOSURE OF** 9 **RECORDS MADE CONFIDENTIAL BY STATUTE**

10 It is true that Arizona's Public Records Law provides a broad right of inspection
11 to the public. *Schoenweiss v. Hamner*, 223 Ariz. 169, 172, 221 P.3d 48, 54-55 (Div. 1
12 2009). However, "[i]t is settled law in Arizona that '[d]espite the unlimited disclosure
13 expressed by the wording of § 39-121, the availability of records for public inspection is
14 not without qualification.' *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. *Public records*
15 *are not available for inspection when they are made confidential by statute. Id.*;
16 *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348-49, ¶¶ 18-19, 35 P.3d 105,
17 109-10 (App.2001)." *Schoeneweiss v. Hamner*, 223 Ariz. 169, 173, 221 P.3d 48, 52
18 (Div. 1 2009) (emphasis added). The custodian of public records **must** deny inspection
19 when the record is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 13-14, 699
20 P.2d 387, 388-89 (Div. 1 1985) (emphasis added).
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25 The only Arizona case that is remotely on point for the issue at hand is *Berry v.*
26 *State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (Div. 1. 1985) ("*Berry*"). In *Berry*,
27 plaintiff (a prisoner) brought an action against the State of Arizona Department of
28 Corrections claiming that he was improperly denied access to his master record file in
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1 violation of Arizona Public Records Law. However, there was a statute, A.R.S. § 31-
2 221, *et seq.* (specifically § 31-221(D)) that clearly prohibited the Department of
3 Corrections from allowing inmates to access their personal master records files and
4 deemed the records files confidential. The appellate court upheld the State's refusal to
5 disclose records, finding that the Public Records Law statute is a general statute that did
6 not apply to the inmate master record files because the specific provisions of A.R.S. §
7 31-221 made the records confidential. *Id.* at 388. The rule is where two statutes
8 conflict, the specific statute controls over the general statute. *Id.* Therefore, A.R.S. §
9 31-221 controlled.
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13 Here, similar to the specific, controlling statutes in *Berry* that made inmate
14 records confidential and not subject to disclosure, A.R.S. § 12-2234 is a specific
15 controlling statute that makes attorney-client privileged communications (such as an
16 engagement letter) confidential and not subject to disclosure. Because A.R.S. § 12-2234
17 makes attorney-client privileged communications confidential. Arizona Public Records
18 Law, A.R.S. §§ 39-101, *et seq.*, specifically, does not require production of a document
19 that has been deemed confidential by statute, rule or a recognized privilege and
20 therefore, the County is not required, under law, to produce the engagement letter.
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25 The bottom line is that the Legislature has made attorney-client communications
26 non-disclosable. A.R.S. § 12-2234. The letter of engagement in this case is an attorney-
27 client communication. Period.
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29 Consequently, Plaintiff's Complaint must be dismissed with prejudice.

1 **IV. CONCLUSION**

2 Defendants respectfully request that Plaintiff's Complaint be dismissed with
3
4 prejudice because Plaintiff fails to state a claim upon which relief can be granted.

5 RESPECTFULLY SUBMITTED this 11th day of September, 2019.

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7 COCHISE COUNTY ATTORNEY

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9 By: 
10 CHRISTINE J. ROBERTS
11 Civil Deputy County Attorney
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15 Copy of the foregoing mailed
16 this 11th day of September, 2019, to:

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21 *Attorney for Plaintiff*
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